

No. 77-1813

Supreme Court, U. S.
FILED

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In the Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1978

HANS BAUSSUS von LUETZOW, PETITIONER

v.

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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**MEMORANDUM FOR THE RESPONDENTS
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Petitioner seeks review of the dismissal of his action challenging his non-selection for promotion to a GS-16 position as Director and Scientific Advisor of an Army research facility at Fort Belvoir, Virginia.

Petitioner's complaint alleged first that the previous incumbent in the position had been appointed non-competitively, in violation of applicable promotion regulations. Petitioner asserted that as a consequence he was entitled to priority consideration for the vacancy under the relevant Federal Personnel Manual provision.¹ Petitioner also alleged that the commanding officer of the research facility adjusted the qualification requirements

¹Federal Personnel Manual 335, 6-4(c)(2) (Pet. App. 8a-9a and n. 2).

for the Director's position and otherwise manipulated the lists of candidates to avoid appointing petitioner. Finally, petitioner maintained that the commanding officer made false, malicious, and damaging statements in petitioner's career appraisal for 1971-1972. Petitioner sought, *inter alia*, promotion, back pay, and punitive damages against the commanding officer.

Following a trial the district court ruled that petitioner failed to prove that he was entitled to the GS-16 position on a priority basis or because he was the best qualified candidate (Pet. App. 5a). The court also found that petitioner presented insufficient evidence to support his claim of improper personnel practices or of malice or false statements by the selecting officer (*ibid.*). The court therefore dismissed petitioner's complaint. The court of appeals affirmed (Pet. App. 7a-10a). Accepting the district court's factual determinations, the court found no arbitrary and capricious action and no violation of any regulation by respondents (Pet. App. 9a-10a).

The decision of the court of appeals is correct and further review is not warranted. The district court found that petitioner failed to prove the critical allegations of his complaint. He did not show that he had been denied a promotion to which he was entitled or that he had been the victim of malicious falsehoods. The court of appeals affirmed these findings. Under this Court's well-settled rule, when two courts have reached the same conclusion on a question of fact, their findings should be accepted as final "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275. No such showing has been made by petitioner.²

²Petitioner also asserts that he should have received a jury trial (Pet. 10-11). It has long been settled, however, that there is no right to a jury in actions against the government. *McElrath v. United States*, 102 U.S. 426.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.